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ABSTRACT

The Department of Health, Education and Welfare's (HEW) final version of its policy interpretation on sex discrimination in varsity collegiate athletics is presented. The policy interpretation is intended to clarify what the Title IX regulation requires and will be used to determine whether a college's intercollegiate athletic program is in compliance with Title IX. Tables compare the key provisions of the regulation and the policy interpretations. The final policy interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. The key standards for measuring compliance are: overall proportionality in availability of athletic scholarships; overall (program-wide) equivalence in availability, quality, and kind of athletic benefits, opportunities, and treatment afforded student athletes; and effectiveness in equally accommodating the interests and abilities of presently enrolled male and female student athletes. The policy does not require that program components be identical, but it provides a limited number of acceptable justifications for "nondiscriminatory differences" in each of the three major areas. The policy interpretation also describes the procedures used by HEW to enforce Title IX and it introduces a state of conditional compliance. (SW)

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UPDATE ON TITLE IX AND SPORTS #3

INTRODUCTION

On December 4, 1979,[1] the Department of Health, Education and Welfare announced the final version of the long overdue policy interpretation on sex discrimination in varsity collegiate athletics. Originally slated for publication in July 1978 when the equal athletic opportunity requirements of Title IX[2] became fully effective for colleges and universities,[3] the policy has been the subject of study and often heated national debate since a draft interpretation was published for comment in December 1978.[4]

The avalanche of responses to the proposed policy—over 700 letters, many of which contained extensive legal analyses—combined with comments from college presidents, athletic directors, and women groups, convinced HEW officials to reexamine much of their thinking on what the policy should be. During the year that followed publication of the proposed policy, HEW staff met extensively with the various interest groups and traveled to college campuses in order to better assess the impact of Title IX on intercollegiate athletics before finalizing the policy.

Calling the final policy "sensible" and "flexible," HEW Secretary Patricia R. Harris said it had been developed in response to requests from colleges and universities for guidance about the athletic sections of the 1975 Title IX regulation. She said the policy interpretation, which parallels the requirements of the regulation also "reminds institutions that they remain obligated by the regulation to meet the athletic interests and abilities of male and female students."

In addition, Secretary Harris noted it was HEW's expectation that "as schools amend their programs, they would do so with sensitivity and with recognition that such changes should result in enhancing—not minimizing—the role of women coaches and athletic directors, as well as women athletes, in sports programs."

The policy interpretation is intended to clarify what the Title IX regulation requires: it is a supplement, *not* a replacement for, or a change in that regulation. Consistent with the statute and regulation, HEW will use the policy interpretation to determine whether a college's intercollegiate athletic program is in compliance with Title IX. (See tables comparing the key provisions of regulation and policy interpretation.)

[1] Published in the December 11, 1979 *Federal Register* (Vol. 44, No. 239, 71413-71423).

[2] Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally assisted education programs.

[3] 45 C.F.R. 86.41.

[4] Published in the December 6, 1978 *Federal Register*. (Vol. 43, No. 238, pp. 56070-58076). See PSEW "Update on Title IX and Sports #2," January 1979.

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SUMMARY OF THE FINAL POLICY INTERPRETATION

The final policy interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The policy interpretation is divided into three sections explaining what is required in three major areas:

- *Compliance in Financial Assistance (Scholarships) Based on Athletic Ability:* In accordance with the Title IX regulation, the governing principle in this area is that all such assistance should be available on a basis substantially proportional to the number of male and female participants in the institution's athletic program.
- *Compliance in Other Program Areas (equipment and supplies; games and practice times; travel and per diem; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services):* In accordance with the Title IX regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits and opportunities.
- *Compliance in Meeting the Interests and Abilities of Male and Female Students:* In accordance with the Title IX regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally accommodated.

The key standards for measuring compliance in each of the above program areas are:

- overall proportionality in availability of athletic scholarships;
- overall (program-wide) equivalence in availability, quality and kind of athletic benefits, opportunities, and treatment afforded student athletes; and
- effectiveness in equally accommodating the interests and abilities of presently enrolled male and female student athletes.

There is considerable flexibility in the policy opportunity. The policy does not require that program components be identical but provides that men's and women's sports programs will be compared to determine whether the college's policies and practices result in *overall* program equivalence. (Equivalence is defined as "equal or equal in effect.")

The policy interpretation also provides a limited number of acceptable justifications for "non-discriminatory differences" in each of the three major program areas. Disparities in proportional scholarship awards, for example, might be justified if the difference arose as the result of the non-discriminatory uneven distribution of higher out-of-state tuition grants between men and women. Similarly, schools are allowed to award fewer grants in order to phase in scholarships as part of team development efforts.

Furthermore, in program areas other than financial assistance, disparities in one program component might be counter-balanced by a disparity in some other aspect of the program, provided the overall opportunities are equivalent.* For example, a small difference in the quality of equipment which favors the men's teams might be weighed against a small disparity in opportunities for travel which favors the women's program. However, no overtly discriminatory policy or disparity so severe that it, by itself, produces inequality of overall athletic opportunity will be treated with such flexibility in applying the policy interpretation.

The Enforcement Process

The policy interpretation also describes the procedures used by HEW to enforce Title IX and introduces a special approach to be applied to inter-collegiate athletic programs: a state of conditional compliance. Under this approach a school which is currently in violation of Title IX's requirements in intercollegiate athletics may still avoid being found in noncompilance if it can demonstrate both:

- a *history* and *continuing practice* of upgrading the program revealed to be deficient *and,*
- an *acceptable* plan indicating that the problem revealed during an investigation by the Office for Civil Rights will be corrected within a "reasonable" period of time.

* Failure to comply with the financial assistance requirement cannot be counter-balanced by other program factors, and by itself constitutes a violation of Title IX.

TITLE IX AND INTERCOLLEGIATE ATHLETICS

Consistent with the requirements of the regulation, HEW will determine whether a school's athletic program is in compliance with Title IX by assessing three basic aspects of the athletic program:

Financial Assistance—Scholarships and grants-in-aid provided on the basis of athletic ability.

The Title IX **regulation** requires that:

> Colleges and universities provide reasonable opportunities for male and female students to receive scholarships and grants-in-aid in proportion to the number of male and female participating athletes.

The **policy** explains that:

> Schools must distribute all athletic assistance on a substantially proportional basis to the number of participating male and female athletes. Unequal spending for either the men's or the women's program may be justified by sex-neutral factors, such as a higher number of male athletes recruited from out-of-state.

Athletic Benefits and Opportunities—This includes equipment, travel, compensation of coaches, facilities, housing, publicity and other aspects of a program .

The Title IX **regulation** specifies the factors that HEW should assess in determining whether a school is providing equal athletic opportunity:

- Equipment and supplies
- Scheduling of games and practice
- Compensation of coaches
- Housing and dining services
- Publicity
- Travel and per diem costs
- Opportunities for coaching
- Locker rooms and other facilities
- Medical and training services
- Other relevant factors

The **policy** explains that schools must provide "equivalent" treatment, services and benefits in those areas. HEW will assess each of those factors by comparing:

- Availability
- Kind of benefits
- Kind of treatment
- Quality
- Kind of opportunities

Accommodation of Student Interests and Abilities—The third section of the policy sets out how schools can meet the requirement of the regulation to "effectively accommodate the interests and abilities of both sexes."

The Title IX **regulation** requires that schools effectively:

> Accommodate the interests and abilities of students of both sexes in the selection of sports and levels of competition.

The policy explains how to accommodate interests and abilities through:

- Selection of sports
- Levels of competition
- Measuring of interests and abilities

TITLE IX AND INTERCOLLEGIATE ATHLETICS

THE REGULATION

I. Athletic Financial Assistance (Scholarships) § 86.37(c)

A recipient that provides athletic scholarships or grants-in-aid must provide reasonable opportunities for those awards in *proportion* to the number of students of each sex participating in intercollegiate athletics.

II. Compliance in Other Athletic Benefits and Opportunities § 86.41(c)

Factors considered in determining whether equal opportunity exists:

- equipment and supplies
- games and practice
- travel and per diem
- coaching and academic tutoring
- assignment & compensation of coaches and tutors
- locker rooms, practice and competitive facilities
- medical and training services and facilities
- housing and dining services and facilities
- publicity
- other factors, as determined by OCR

POLICY INTERPRETATION

I. Athletic Financial Assistance (Scholarships)

Scholarship dollars must be divided equally, in proportion to the numbers of male and female athletes.

Example: Total scholarship fund – $100,000 in a school with 70 male and 30 female athletes. Male athletes are entitled to $70,000. Female athletes are entitled to $30,000.

Unequal results can be explained by factors such as:

- higher scholarship costs for out-of-state students which do not result from policies that limit the availability of scholarships for the underrepresented sex
- reasonable professional decisions about the number of awards in any year which are most appropriate for program development

II. Compliance in Other Athletic Benefits and Opportunities

HEW will compare for each sex and for each factor:

- availability
- quality
- kind of benefits
- kind of opportunities
- kind of treatment

Each program component should be *equal or equal in effect.*

HEW *does not require identical benefits, opportunities, or treatment,* but the effect of any differences must be negligible.

Factors which may justify any differences found:

- the unique aspects of particular sports (e.g., type of equipment required)
- legitimate sex-neutral factors related to special circumstances of a temporary nature
- unique demands associated with the operation of a competitive event in a single-sex sport
- voluntary affirmative action taken to overcome the effect of past discrimination

TITLE IX AND INTERCOLLEGIATE ATHLETICS

THE REGULATION

III. Effective Accommodation of Student Interests & Abilities § 86.41(c)

HEW will consider the following factor, among others, in determining whether equal opportunity exists:

- Whether *the selection of sports & levels of competition effectively accommodate* the interests and abilities of members of both sexes.

Note: After May 7, 1980 both the new Department of Education and the Department of Health and Human Services (formerly HEW) will have Title IX responsibility.

POLICY INTERPRETATION

III. Effective Accommodation of Student Interests & Abilities

Measuring Athletic Interests and Abilities

The recipient must:

- Take into account the increasing levels of women's interests and abilities;
- Use methods of determining interest and ability that do not disadvantage the underrepresented sex;
- Use methods of determining ability that take into account team performance records; and
- Use methods that are responsive to the expressed interests of students capable of intercollegiate competition who belong to the underrepresented sex.

Selection of Sports

- When there is a team for only one sex, and the excluded sex is interested in the sport, the university may be required to:
  - —Permit the excluded sex to try out for the team if it is not a contact sport; or
  - —Sponsor a separate team for the previously excluded sex if there is a reasonable expectation of intercollegiate competition for that team.
- Teams do **not** have to be integrated.
- The same sports do **not** have to be offered to men and to women.

Levels of Competition

Equal competitive opportunity means:

- The numbers of men and women participating in intercollegiate athletics is in proportion to their overall enrollment; or
- The school has taken steps to insure that the sex underrepresented in athletic programs is offered new opportunities consistent with the interests and abilities of that sex; or
- The present program accommodates the interests and abilities of the underrepresented sex.

and

- Men and women athletes, in proportion to their participation in athletic programs, compete at the same levels; or
- The school has a history and practice of upgrading the levels at which teams of the underrepresented sex compete.

Schools are not required to develop or upgrade an intercollegiate team if there is no reasonable expectation that competition will be available for that team.

TITLE IX AND INTERCOLLEGIATE ATHLETICS

WHAT ABOUT THE FOOTBALL TEAM?

SCHOLARSHIPS

The Standard

- Total $ available for all sports must be divided between men and women in proportion to # of men and # of women athletes

Flexibility

- Each school decides how to spend $ available for men's programs and women's programs

Disparities in proportionality of total scholarship aid may be justified by:

- Decision to phase-in women's scholarships if appropriate for development of women's teams

or

- Other nondiscriminatory factors

Effect on Competition

- Current average statistics indicate only 8% disparity
  # athletes: 70% men; 30% women
  $ scholarships: 78% men; 22% women
- If reduction of scholarships for men necessary, all competing schools can make same reduction (e.g., NCAA Division 1 lowers current scholarship limit)

OTHER PROGRAM COMPONENTS

The Standard

- For all sports, program components (e.g., equipment, facilities, medical services) must be substantially equivalent for men and women athletes

Flexibility

Disparities in any program component may be justified by:

- Nature of the sport (e.g., frequency with which equipment wears out; size and upkeep requirements of stadium; rate of injury from participation)

or

- Size of competitive events

or

- Other nondiscriminatory factors

Effect on Competition

- Support for football need not be cut even though women do not have comparable team
- National level competition need not be cut even though women do not compete nationally

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These charts were developed by HEW.